(1) (6) C.S.15

IN THE HIGH COURT OF JUDICATURE AT BILASPUR (C.G.)

CIVIL REVISION PETITION NO. 142 OF 2004

Single Bench

IN THE MATTER OF:

BHARAT ALUMINIUM CO. LIMITED
Balconagar, Korba – 495684,
Chhattisgarh. ... PETITIONER

VERSUS

KAISER ALUMINIUM
TECHNICAL SERVICES, Inc.
6177 Sunol Boulevard
Pleasanton, California 94566-7769 ... RESPONDENT

CIVIL REVISION AGAINST THE ORDER DATED 20.07.2004 PASSED BY THE DISTRICT JUDGE BILASPUR IN MJC NO.38/2003.UNDER SECTION 115 OF THE CODE OF CIVIL PROCEDURE.

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HIGH COURT OF CHHATTISGARH AT BILASPUR

CIVIL REVISION NO. 142 OF 2004

PETITIONER : BHARAT ALUMINIUM COMPANY LIMITED (BALCO)

VS.

RESPONDENT : KAISER ALUMINUM TECHNICAL SERVICES INC. (KATSI)

Order post for 31-01 **- 2007**

Sd/-
DHIRENDRA MISHRA
Judge

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HIGH COURT OF CHHATTISGARH AT BILASPUR

CIVIL REVISION NO. 142 OF 2004

PETITIONER : BHARAT ALUMINIUM COMPANY LIMITED (BALCO)

VS.

RESPONDENT : KAISER ALUMINUM TECHNICAL SERVICES INC. (KATSI)

Present:

Shri S.N. Mukherjee, Sr. Advocate with Shri Tarun Aith, Shri Ratnanko Banerjee, Shri Abhishek Sinha and Shri Ghanshyam Patel, Advocates for the petitioner.

Shri Ravish Agrawal, Sr. Advocate with Shri V.K. Munshi, Shri Cicu Mukhopodhya, Shri Sanjay S. Agrawal, Shri Abhijeet Sinha and Shri Vivek Swamy, Advocates for the respondent.

O R D E R
(Passed on 31/01/2007)

Dhirendra Mishra, J

The circumstances giving rise to institution of this civil revision are that the petitioner made an application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act') before the District Judge, Bilaspur for setting aside of foreign award dated 12.11.2002 (Annexure A/2) which was registered as M.J.C. No. 14/2003. The respondent also moved an application being M.J.C.No. 38/2003 under Section 47 and 49 of the Act for enforcement of the above foreign award. The learned District Judge decided the above matter by common order dated 20th July 2004 (Annexure A/1). The application under Section 34 of the Act was dismissed as not maintainable and the application filed by the respondent under Sections 47 and 49 of the Act

was allowed. The petitioner was directed to deposit the money as per award within 30 days. The petitioner filed a miscellaneous appeal under Section 37 of the Act against the order of dismissal of their application under Section 34 of the Act which was dismissed by the Court vide judgment dated 10th August 2004 on the ground that the application under Section 34 was not maintainable before the District Judge, Bilaspur.

2. Against the above judgment the petitioner filed a Special Leave Petition before the Supreme Court which was admitted on 21st November 2005 and the same is pending.

3. The petitioner has challenged the impugned order allowing the application under Sections 47 and 49 of the Act of the respondent mainly on the following grounds:

(i) The impugned order does not deal with the arguments advanced by the parties particularly relating to enforcement of the arbitral award under Sections 47 and 49 of the Act without considering the enforceability of the foreign award in the light of Section 48 (1) & (2) of the Act.

(ii) The award was not enforceable as the arbitral procedure culminating in the award was not in accordance with the arbitration agreement of the parties.

(iii) The award deals with the difference not contemplated by or not falling within the terms of the submissions to arbitration

or it contains decision on matters beyond the scope of submissions to arbitration.

(iv) The enforcement of the award would be contrary to public policy of India.

4. As per contract of Annexure A/3 arbitration was to be held pursuant to English Arbitration Law and the agreement was to be governed by the prevailing law in the India and the Court of arbitration was to be held only in London, England.

5. Arguments advanced by the petitioner is (i) that the award of compound interest by the learned arbitrator was contrary to the public policy of India and was also contrary to the agreement of the parties i.e. the contract, (ii) that the question of limitation is a procedural law and the same is governed by the Indian Limitation Act, (iii) that the dismissal of the petitioner's counterclaim on the ground of limitation was contrary to the arbitral procedure as the same was contrary to the agreement of the parties and in these circumstances the award could not be enforced as per Section 48 (1) (d) of the Act.

6. On the other hand, learned counsel for the respondent vehemently challenged the maintainability of the civil revision. It was contended that Part-II of the Act is a Code by itself which relates to enforcement of the foreign award and the general provisions of the Code of Civil Procedure (C.P.C.) relating to revision cannot be read into the Act. As per Section 49 of the Act enforceable foreign award is deemed to be a decree of the Court enforcing the award. A decree is either expressly appealable by a

statute or not. No revision under Section 115 of the Act can lie against a decree. A revision under Section 115 of the C.P.C. lies only against the orders passed by subordinate courts from which appeals are not specifically provided by statute. Thus, the foreign award being a deemed decree, the question of revision being maintainable against such a decree simply cannot arise.

7. The further contention of the respondent is that the petitioner cannot be permitted to raise objection against the award of compound interest and dismissal of Balco's counterclaim on the ground of limitation as the same amounts to arbitral procedure contrary to the agreement of the parties and therefore, award could not be enforced on account of Section 48 (1) (d) of the Act as the same was agitated neither before the arbitration Tribunal nor before the learned District Judge and a new plea cannot be allowed to be raised in the revision. It was argued that the grant of compound interest is not opposed to public policy of India as there is no absolute prohibition in any statute against the award of compound interest. Section 48 (2) (b) contemplates enforcement and not the award must be opposed to public policy. There was no issue before the arbitral Tribunal that the arbitrator could not award compound interest, on the contrary, Balco itself claimed compound interest at the rate of 18% per annum. This plea was not raised even before the learned District Judge in the form that has been raised in the revision. Even otherwise, Article 12.1 of the contract only limits the maximum rate of interest i.e. 7.5% per annum. It does not stipulate any agreement between the parties as to the mode of computation i.e. whether simple or

compound or the "rests" on which the rate and the mode are to be calculated and the stipulation of 7.5% per annum indicates that annual rests are clearly permissible since the arbitration was governed by English law in all respects and Section 49 of the English Act empowers the arbitrator to grant compound interest.

8. With respect to the ground that dismissal of Balco's counterclaim on the ground of limitation made the arbitral procedure contrary to the agreement of the parties and hence, the award could not be enforced on account of Section 48 (1) (d) of the Act, it is contended that Balco could not be permitted to raise such a plea at the stage of enforcement of the award on the pretext that limitation is a procedural law and therefore Section 48 (1) (d) of the Act will apply. This plea was only raised in objection filed under Section 48 of the Act before the learned District Judge and no such plea has been even taken in the revision petition, therefore, the petitioner cannot be permitted to take a new plea at the stage of revision. It was further submitted that Balco did not raise a plea before the learned Tribunal that it invoked the arbitration on 26th November, 1997 by using the word "counter claim" in its reply. No such plea was taken in any of the written submissions filed before the arbitrator, therefore, the arbitrator had no opportunity to decide the above issue and KATSI had no opportunity to demonstrate before the arbitration Tribunal. The plea of limitation is a mixed question of fact and law which requires investigation into the facts and cannot be allowed to be raised at the stage of enforcement of a foreign award and/or in revision. The reference of arbitral procedure in Section 48 (1) (d) is a

reference to the agreement between the parties as to conduct of the arbitration in accordance with Article 17 of the contract. A wrong decision, if any, on limitation is an issue involving merits of the claim and the same cannot be a ground to challenge the enforcement under Section 48 (1) (d) of the Act. Even otherwise, the counterclaim of Balco was based on assumption that there was breach of contractual obligations on the part of KATSI who failed in commission of Celtrol System and failed to meet the firm target figures. However, by the impugned award it has been categorically held that KATSI was not in breach and in fact Balco was in breach of its obligations under the contract.

9. I have heard learned counsel for the parties.

10. First of all, I propose to consider the maintainability of the civil revision.

11. So far as maintainability of the instant civil revision is concerned, learned counsel for the petitioner relying upon the decisions reported in **(2002) 5 SCC 510** in the matter of **I.T.I. LTD. VS. SIEMENS PUBLIC COMMUNICATIONS NETWORK LTD.**, **(2002) 5 SCC 520** in the matter of **NIRMA LTD. VS. LURGI LENTJES ENERGIETECHNIK GMBH** submitted that a civil revision petition will lie from an order passed under the Act which is not appealable.

12. On the other hand, learned counsel for the respondents vehemently contended that the orders cited by the petitioner are clearly

distinguishable as neither of the two cases deals with the foreign award or with Part-II of the Act but are in connection with Section 37 falling in Part-I of the Act.

13. In the matter of I.T.I. Ltd. (supra) an interim order was passed by the arbitral Tribunal against which an appeal was preferred under Section 37 (2) (b) of the Act, which was dismissed by the learned Civil Judge. Against dismissal of the appeal, a civil appeal was preferred directly to the Supreme Court. In the aforesaid circumstances, the question for consideration was - whether a revision petition under Section 115 of the C.P.C. lies to the High Court as against an order made by a Civil Court in appeal preferred under Section 37 of the Act? Approving the view expressed in the case of Nirma Ltd. (supra) in paragraph 1, the Supreme Court in the matter of I.T.I. Ltd. (supra) in paragraph 13 held as under;

> "13. We also do not find much force in the argument of learned counsel for the appellant based on Section 5 of the Act. It is to be noted that it is under this Part, namely, Part I of the Act that Section 37(1) of the Act is found, which provides for an appeal to a civil court. The term "court" referred to in the said provision is defined under Section 2 (e) of the Act. From the said definition, it is clear that the appeal is not to any designated person but to a civil court. In such a situation, the proceedings before such court will have to be controlled by the provisions of the Code, therefore, the remedy by way of a revision under

Section 115 of the Code will not amount to a judicial intervention not provided for by Part I of the Act. To put it in other words, when the Act under Section 37 provided for an appeal to the civil court and the application of the Code not having been expressly barred, the revisional jurisdiction of the High Court gets attracted. If that be so, the bar under Section 5 will not be attracted because conferment of appellate power on the civil court in Part I of the Act attracts the provisions of the Code also.

14. It is not in dispute that in the case of I.T.I. Ltd. (supra) enforcement of foreign award was not in issue. Enforcement of foreign award has been dealt with in Part-II of the Act. Section 49 of the Act envisages that where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court.

15. Section 48 of the Act deals with the circumstances under which enforcement of the foreign award may be refused at the request of the party against whom it is invoked.

16. Section 50 of the Act deals with the appealable orders which is being reproduced as under;

"50. **Appealable orders**.- (1) An appeal shall lie from the order refusing to –

(a) refer the parties to arbitration under section 45;

(b) enforce a foreign award under section 48,

to the court authorized by law to hear appeals from such order.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

17. As reproduced hereinabove, it has been held in the matter of I.T.I. Ltd (supra) in paragraph 13 that Section 37 of the Act provides for an appeal to Civil Court, the Court is defined under Section 2(e) of the Act and thus holding that an appeal is not to any designated person but to a Civil Court. In such a situation the proceedings before such Court will have to be controlled by the provisions of the Code, therefore, the remedy by way of revision under Section 115 of the Code will not amount to a judicial intervention not provided by Part-I of the act as the application of the Code has not been expressly barred. Thus from the above observation of the Supreme Court it may be deduced that where no appeal is provided by the statute from the decree of a subordinate court, the provisions of the C.P.C. could not come into play and Section 115 thereof could not be available.

18. It is clear from Section 49 of the Act that where the Court i.e. trial Court in the instant case, enforces a foreign award, the foreign award is deemed to be a decree of that Court. When appeal is not provided for, the provisions of the Code do not come into play at all.

19. Even otherwise, from a bare perusal of Section 50 of the Act, it is clear that appeal lies to the Courts authorized by law to hear appeals against the order refusing to refer the parties to arbitration under Section 45 and refusing to enforce a foreign award under Section 48 of the Act

and no second appeal lies from an order passed in appeal under this Section, however, right to appeal to the Supreme Court has been saved under sub-section 2 of Section 50 of the Act which reads as under;

> "50. **Appealable orders.**- (1) xxxx xxxx xxxxx
>
> (2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

Section 50 provides for appeal to the Court authorized by law to hear appeals from the orders refusing to refer the parties to arbitration under Section 45 and refusing to enforce a foreign award under Section 48 of the Act, meaning thereby that other orders passed by the Court under this Part are not appealable to the Courts authorized by law to hear appeals from such order, however, sub-section 2 of Section 50 envisages any right to appeal to the Supreme Court against any order passed by the Court in this Part which is otherwise not appealable to the Courts authorized by law to hear appeal from such order under Section 50(1) of the Act, is appealable before the Supreme Court. From the reading of sub-section 2 of Section 50 it is clear that the constitutional right under Article 136 of Constitution of India for special leave to appeal to the Supreme Court is available to the petitioner.

20. Placing reliance on various judgments of the Hon'ble Supreme Court, learned counsel for the respondent submits that, it is settled law that scope of enquiry in proceedings for enforcement of a foreign award is limited and the awards cannot be impeached on merits. In the matter of

Renusagar Power Co. Ltd. Vs. General Electric Co. reported in **(1994) Supp 1 SCC 644** while considering the scope of enquiry under Section 7 of the Foreign Awards Act, 1961, the Supreme Court held thus;

> "37. In our opinion, therefore, in proceedings for enforcement of a foreign award under the Foreign Awards Act, 1961, the scope of enquiry before the Court in which award is sought to be enforced is limited to grounds mentioned in S. 7 of the Act and does not enable a party to the said proceedings to impeach the award on merits.

In the matter of **Thyssen Stahlunion GMBH Vs. Steel Authority of India Ltd**. Reported in **(1999) 9 SCC 334**, the Hon'ble Supreme Court held as under;

> "40. ..... As a matter of fact if we examine the provisions of Foreign Awards Act and the new Act there is not much difference for the enforcement of the foreign award. Under the Foreign Awards Act when the Court is satisfied that the foreign award is enforceable under that Act the Court shall order the award to be filed and shall proceed to pronounce judgment accordingly and upon the judgment so pronounced a decree shall follow. Sections 7 and 8 of the Foreign Awards Act respectively prescribe the conditions for enforcement of a foreign award and the evidence to be produced by the party applying for its enforcement. Definition of foreign award is same in both the enactments. Sections 48 & 47 of the new Act correspond to Ss. 7 and 8 respectively of the Foreign Awards Act. While S. 49 of the new Act states that where the Court is satisfied that the foreign award is enforceable under this Chapter (Chapter I, Part II, relating to new York Convention Awards) the award is deemed to be decree of that Court. The only difference, therefore, appears to be that while under the Foreign Awards

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Act a decree follows, under the new Act foreign award is already stamped as the decree. Thus if provisions of the Foreign Awards Act and the new Act relating to enforcement of the foreign award are juxtaposed there would appear to be hardly any difference."

The above position has been reaffirmed by the Hon'ble Supreme Court in the matter of **Bhatia International Vs. Bulk Trading Company**, reported in **(2002) 4 SCC 105** in paragraph 28 which is being reproduced:

"28. .....thus it is clear that an application for interim measure can be made to the courts in India, whether or not the arbitration takes place in India, before or during arbitral proceedings. Once an award is passed, then that award itself can be executed. Sections 49 & 58 provide that awards covered by Part II are deemed to be a decree of the court. Thus "foreign awards" which are enforceable in India are deemed to be decrees A domestic award has to be enforced under the provisions of the Civil Procedure Code ....."

21. Taking into consideration the submissions made by learned counsel for the respondent and further considering the law laid down by the Hon'ble Apex Court, this Court is of the considered opinion that no appeal is provided for against a deemed decree of that court resulting from enforcement of a foreign award. The only right is the constitutional right under Article 136 of the Constitution of India for a special leave to appeal to the Supreme Court. The purpose for not providing appeal against the enforcement of a foreign award is obvious because firstly, the scope for refusing to enforce the award is narrow and limited and secondly, the essential purpose of international commercial arbitrations

is the expeditious resolution of such disputes. Part II of the Act is a Code by itself for the purpose of enforcement of a foreign award and general provisions of the C.P.C. cannot be read into the Act. A decree (deemed decree in the present case) is either expressly appealable by statute or not, no revision under Section 115 of the C.P.C. lies against the decree as civil revision lies only against the orders passed by the subordinate Courts from which appeals are not specifically provided by the statute. Foreign award being a deemed decree, the question of revision being maintainable against such deemed decree simply cannot arise as there is no provision in the C.P.C. particularly under Section 115, for revision against a foreign award. As already held hereinabove, the judgment in the matter of I.T.I. Ltd (supra) has no application in the instant case as the same has been distinguished on facts and law.

22. On the basis of aforesaid analysis, the instant civil revision under Section 115 of the C.P.C. is not maintainable and the same is dismissed with costs.

Sd/-
DHIRENDRA MISHRA
Judge